SUPREME COURT, U. S.

JAN 22 1969

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# In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 966

JOSEPH ROBERT CORRIGAN,
Administrator of the Estate of SHIRLEE ANN CORRIGAN,
*Petitioner,*

vs.

E. W. BOHREN TRANSPORT CO.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
## To the United States Court of Appeals
## For the Sixth Circuit.

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## PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Now come Anthony O. Calabrese Jr., Esquire and C. D. Lambros, Esquire on behalf of the Petitioner and respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered Sept. 30, 1968.

## OPINIONS BELOW.

Opinion of Trial Judge overruling Respondent's Motion for Judgment notwithstanding the verdict is set forth in Appendix, *infra,* p. 10.

Opinion of the Court of Appeals, 6th Circuit, is set forth in the Appendix, *infra,* p. 14.

## JURISDICTION.

The Judgment of the Court of Appeals for the Sixth Circuit was filed September 30, 1968 (Appendix, *infra*, page 22). A timely Petition for Rehearing was denied on November 26, 1968 (Appendix, *infra*, page 22).

The Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED.

1. The very vital and burning issue here simply stated is whether an Appellee Court may overrule a jury verdict where the verdict is consistent with the evidence, including the evidence of the party who lost in the presence of the jury. Since the number of jury trials in federal courts is becoming more voluminous each year, it seems obvious that clear rules must be established as applies to jury trials. The Sixth Circuit Court of Appeals here, by their reversal of this jury verdict has complicated the application of rules as pertains to jury trials rather than enunciating clear cut provisos. Another issue involved in this very important case is whether or not a Court of Appeals can leave a Motion for New Trial undecided as they did here while denying the petition for rehearing. The Petitioner herein contends that the Supreme Court of the United States can implement this undecided issue by ordering a new trial herein.

2. The importance of maintaining strong Federal policy for Jury determination of disputed factual questions as expressed in the Seventh Amendment. The United States Court of Appeals for the Sixth Circuit in overruling and reversing a Jury verdict of the United States District Court for Northern Ohio has impeded and in this particular case subverted this policy.

3. The Court of Appeals substituted their judgment for that of the Jury, in finding as a matter of law, that decedent's negligence was the proximate cause of her death when the jury specifically found in answer to interrogatories propounded by the defendant that the plaintiff was negligent but that the negligence was not the proximate cause of her death. Judge Combs concluded that the Jury's other finding that this negligence was not a cause of the plaintiff's death was irrelevant. The Court's conclusion that the decedent's negligence constituted as a matter of law a proximate cause of her death is dependent upon the Jury's finding as to the factual situation at the time of the collision. In order for a proximate cause to be only a legal issue, the jury would be required to find that the decedent has negligently remained in her vehicle and that she was actually in the vehicle at the time of the collision. There is no finding by the Jury as to this factual situation.

## STATUTE INVOLVED.

The Seventh Amendment of the United States Constitution (Civil Trials):

> "In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

## STATEMENT OF THE CASE.

The accident which caused the decedent's death occurred at approximately 1:30 A.M. on the Lakeland Expressway near Cleveland, Ohio. The decedent was alone in her disabled vehicle which was facing east in the right lane next to the berm of the highway. One witness, Timothy Prayner, saw the disabled vehicle and stopped to offer assistance. He observed that her headlights were dim. He told her to stay in the car. She tried to start the car while he was standing there. After the witness Prayner, left, another motorist William Wallace came upon the scene, and went for assistance. During the interval of about two minutes Mrs. Corrigan's car was struck from the rear and she was killed. The defendant admitted negligence in that its driver was not keeping a proper lookout, but contended that Mrs. Corrigan had been contributorily negligent.

The case herein was between a plaintiff, resident of Ohio and defendant resident of Indiana, and therefore was filed in the United States District Court for the Northern Division of Ohio and the question of violation of the Seventh Amendment of the U. S. Constitution is presented in view of the reversal of the jury's verdict and judgment by the U. S. Court of Appeals. In Answer to Interrogatories, on findings of fact, the jury found no contributory negligence on the part of the decedent.

## REASONS FOR GRANTING WRIT.

**1. Should there be a strong and clear Federal Policy of maintaining the sanctity of Jury determination of disputed factual questions expressed in the Seventh Amendment?**

In order to avoid chaos, there should be and has been established a strong and clear Federal Policy of maintaining Jury determination of disputed factual questions as expressed in the Seventh Amendment to the United States Constitution.

The strong Dissent by Judge Anthony J. Celebrezze in the Court of Appeals, Sixth Circuit, amplified the reasons why this Writ of Certiorari should be allowed. There is no more important principle in our system of Jurisprudence than that of maintaining the sancity of Jury decisions. Judge Celebrezze said in his dissent, "The application of the Ohio standard and the federal stand are the same, as this Court noted in *Lones v. Detroit, Toledo and Ironton Railroad Company,* ____ F. 2d ____ (6th Cir. 1968), it would be inappropriate to decide the question of which standard applies, when, as here, the issue has been neither briefed nor argued. *Cf., Dick v. New York Life Insurance Co.,* 359 U.S. 437, 444-45 (1959). On the facts of the instant case, application of either standard should result in a determination that the Jury could have reasonably found that any negligence of the decedent was not the proximate cause of her death. The Jury stated that the decedent was negligent in failing "to protect her own life by not getting herself off the highway." We can only speculate as to the basis of the Jury's Answer to the interrogatory. Judge Celebrezze went on to say, "The Jury had all the evidence before it; it had the benefit of the persuasive arguments of counsel; and it had a proper instruc-

tion on the law. The trial judge, who also heard all of the evidence, thought the evidence supported the Jury's verdict and that the answer to the interrogatory was consistent with the verdict. In reversing the Jury verdict and the Judgment of the Trial Court on the basis of the cold record before us, we should be careful that we do not subvert the strong policy favoring jury trials expressed in the Seventh Amendment."

*Atlantic & Gulf Stevedores vs. Ellerman Lines,* 369 U. S. 355 at 364 (1962).

The classic statement of law in this area is *Lavender v. Kurn,* 327 U.S. 645 (1946) in that case the Jury rendered a verdict for plaintiff on the issue of negligence in the face of conflicting evidence some of which indicated negligence on the part of the defendant was a physical impossibility. "The Jury having made that inference, the respondents were not free to litigate the factual dispute in a reviewing Court. Under the circumstances it would be an undue invasion of the Jury's historic function for an Appellate Court to hold the conflicting evidence, judge the credibility of witnesses and arrive at one opposite from the one reached by the Jury. 327 U. S. 652-3.

The Court herein reversed the trend toward maintaining the sanctity of Jury determination by substituting their judgment for that of the Jury who heard the case at the trial level. This Writ should be allowed in order to maintain a clear and strong Policy of having the Jury decide disputed factual questions where there is an evidentiary basis for same consistent with standards as applied from the Seventh Amendment of the United States Constitution.

Further, the Court of Appeals herein never ruled on the Motion for New Trial filed by the Petitioner herein

which can be implemented and ruled on herein by the United States Supreme Court by Granting the Writ for Certiorari herein.

**2. Where there is an evidentiary basis for the Jury's verdict, is the Jury free to discard or disbelieve whatever facts are inconsistent with its conclusion? If the Answer to the foregoing question is "YES," is the Appellate Court's function exhausted when that evidentiary basis becomes apparent?**

The Jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion and the Appellate Court's function is exhausted when that evidentiary basis becomes apparent. *Lavender v. Kurn,* 327 U. S. at 653.

The Sixth Circuit Court of Appeals of the United States in this case substituted their judgment for that of the Jury in the District Court, the Honorable G. Kalbfleisch, District Judge presiding.

In *Gruenthal v. Long Island Railroad Co., et al.,* decided by the U. S. Supreme Court November 18, 1968, No. 35, October Term, the Supreme Court held that the Court of Appeals in question exceeded its Appellate Powers in reviewing the denial of the Motion to Set Aside the award either because such review is Constitutionally precluded by the provision of the Seventh Amendment that "no fact tried by a Jury, shall be otherwise reexamined in any court of the United States than according to the rules of the Common Law" The Supreme Court further held that the decision of the trial court should not have been disturbed in the instant case. The Court of Appeals regarded its inquiry as limited to determining whether the trial judge abused his discretion in denying

the Motion of the railroad. Its guide for that determination was the standard of review announced in its earlier decision in *Dagnello v. Long Island R. Co.* 289 F. 2d. 797, 806 (1961).

We therefore conclude that the action of the trial judge should not have been disturbed by the Court of Appeals. Therefore, the judgment of the Court of Appeals is reversed and the case is remanded to that Court with direction to enter a judgment affirming the judgment of the District Court.

**3. Where there is an evidentiary basis in the case that makes the Jury's Answer to the Interrogatories harmonious with its verdict, should the Judgment of the Jury be affirmed?**

Rule 49(b), Federal Rules of Civil Procedure, provides: "When the General Verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58." Since there is an evidentiary basis in this case that makes the Jury's answer to the interrogatory harmonious with its verdict, the judgment should be affirmed.

The trial court stated in its opinion overruling Respondent's Motion for Judgment Notwithstanding the Verdict that, "the Jury's verdict is amply supported by the evidence and that in this case reasonable minds may differ on the Answer to the question of proximate causation of the death of plaintiff's decedent.

Such being the state of the record, the question was properly for the jury to decide."

## CONCLUSION.

For the foregoing reasons and to maintain a strong consistency in our federal court system as relates to Jury Trials, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

C. D. LAMBROS,
ANTHONY O. CALABRESE, JR.,
*Counsel for Petitioner.*

## APPENDIX.

### MEMORANDUM RE: MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

(Filed July 31, 1967.)

KALBFLEISCH, *J.*

Defendant, E. W. Bohren Transport Company, has moved pursuant to Rule 50(b) of the Federal Rules of Civil Procedure for an order setting aside the jury's verdict in this case and the judgment entered thereon, and entering final judgment for defendant in accordance with defendant's motion for a directed verdict at the close of the evidence upon the following grounds:

> "1. Plaintiff has failed to adduce evidence upon which his judgment can be sustained.
>
> 2. The evidence which was produced shows conclusively that plaintiff is barred from recovery as a matter of law.
>
> 3. The Court erred in refusing to grant defendant, E. W. Bohren Transport Company's motion for directed verdict after all the evidence.
>
> 4. The special findings of the jury indicate that both plaintiff and plaintiff's decedent were negligent. This negligence, as a matter of law, was a proximate cause of the death of plaintiff's decedent requiring this Court to enter final judgment for the defendant."

As to defendant's first contention, it must be noted that in counsel's opening statement defendant admitted its driver's negligence. This left only the issues of contributory negligence of plaintiff or of his decedent and the issue of damages. As to damages, there was an abundance of testimony showing damages, including that of an economist, Professor Norman Leonard, concerning the value of a substitute wife and mother. Under Ohio law, plaintiff was not required to prove his or his decedent's free-

dom from contributory negligence. It thus may be seen that defendant's first contention is wholly without merit.

In light of the foregoing, defendant's second, third and fourth contentions can have application only to the issues of contributory negligence presented by the affirmative defense undertaken by defendant.

The thrust of defendant's motion is that since the jury, in answer to special interrogatories, found both plaintiff and his decedent to have been negligent, reasonable minds cannot differ in finding that such negligence proximately caused the death of plaintiff's decedent. The jury, however, specifically found such negligence not to have proximately caused the decedent's death.

Plaintiff's counsel argued to the jury that if plaintiff or his decedent was negligent, such negligence was not a proximate or direct cause of the death of plaintiff's decedent, but rather was a remote cause. Defendant's counsel argued that both plaintiff and his decedent were contributorily negligent and that such proximately caused the decedent's death.

The Court instructed the jury fully on the issues of contributory negligence as well as on the matter of direct and proximate cause as opposed to indirect or remote cause.

At defendant's instance special interrogatories were submitted to the jury. In the jury's answers to those interrogatories there was no inconsistency with its verdict.

This case appearing to fall within the rule announced by the Ohio Supreme Court in *Ricks v. Jackson*, 169 Ohio St. 254 (1959), the Court did not charge on the doctrine of assumption of the risk. Defendant suggests in its brief in support of the present motion that a charge on "special" assumption of the risk might have been given but does not urge that ground upon this motion. However, here,

as in the *Ricks* case, there was no evidence to support any charge on any assumption of risk and the charge given as to contributory negligence, as required by *Ricks*, was adequate to present the issue of plaintiff's fault to the jury.

Defendant, of course, does not dispute the sufficiency of the evidence to support the jury's finding of negligence of plaintiff and of plaintiff's decedent. The negligence of plaintiff's decedent found by the jury was:

> "failure to protect her own life by not getting herself off the highway."

Defendant contends such failure on her part was also the proximate cause of her death, notwithstanding defendant's admissions as to its driver's negligence Defendant cites as authority *Railway Co. v. Helber*, 91 Ohio St. 231, 241 (1915), in which the Ohio Supreme Court defined proximate cause. There the Court said that generally:

> "* * * the proximate cause of a result is that which in a natural and continued sequence produces the result and without which it would not have happened."

Defendant contends that if plaintiff's decedent had gotten off the highway the accident would not have happened, and concludes that therefore her failure to do so was the proximate cause of her death. This contention ignores the fact that in the instant case the jury was instructed by language of the same import as that used by the Ohio Supreme Court in the decision quoted above. Further, defendant's contention ignores the distinction between remote and proximate cause. The jury was fully instructed in regard to the distinction and there was sufficient evidence to support its finding of fact that the negligence of defendant's driver alone proximately caused the decedent's death.

Neither the jury's finding of plaintiff's negligence in "Allowing her [plaintiff's decedent] to use his automobile which he knew was in poor operating condition and his failure to provide for her safe return from work after her telephone call to him," nor the finding as to plaintiff's decedent quoted above, is such that defendant is entitled to judgment as a matter of law. None of the cases cited as authority by defendant in support of its motion appear to have presented circumstances analogous to those appearing in this case. It is apparent that in none of the railroad or streetcar cases cited by defendant was the question of remoteness of cause clearly presented by the facts as was true upon trial of the instant case.

It is the Court's opinion that the jury's verdict is amply supported by the evidence and that in this case reasonable minds may differ on the answer to the question of proximate causation of the death of plaintiff's decedent. Such being the state of the record, the question was properly for the jury to decide. See *Smith v. Zone Cab*, 135 Ohio St. 415 (1939).

This motion and defendant's brief in support of this motion illustrate the relentless refusal of defendant's counsel to accept the law of Ohio as to the non-applicability of the doctrine of "assumption of risk" in the instant case.

Defendant's motion will be overruled.

GIRARD E. KALBFLEISCH,
*United States District Judge.*

**OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.**

(Decided September 30, 1968.)

Before: O'SULLIVAN, CELEBREZZE, and COMBS, Circuit Judges.

COMBS, Circuit Judge. This appeal is from a judgment for the plaintiff in an action for wrongful death By reason of diversity of citizenship of the parties, the action was brought in the United States District Court for the Northern District of Ohio, Eastern Division.

There is little dispute about the facts The accident which caused the decedent's death occurred at approximately 1:30 A.M., on the Lakeland Expressway near Cleveland, Ohio. The Lakeland Expressway is a four-lane superhighway with a median strip separating the eastbound and westbound lanes. The decedent, Mrs. Shirlee Ann Corrigan, was alone in her disabled automobile which was facing east in the right lane next to the berm of the highway. One witness, Timothy Prayner, saw the disabled vehicle and stopped to offer assistance. Mrs. Corrigan was seated in her car trying to start the motor but apparently the battery was dead. Prayner offered to take her to a service station but she declined to leave the car. He remained about ten minutes and then drove away. Shortly after Prayner left, another motorist observed Mrs. Corrigan sitting in her car which was still on the highway. Recognizing her, he turned off the expressway, intending to return and offer his help. During this interval, estimated at approximately two minutes, Mrs. Corrigan's car was struck from the rear by defendant's truck.

The defendant admitted negligence in that its driver was not keeping a proper lookout, but contended that Mrs. Corrigan had been contributorily negligent. In answer

to interrogatories, the jury found that Mrs. Corrigan was negligent "in failing to protect her own life by not getting herself off the highway," but that her negligence was not a proximate cause of her death. The defendant requested the court to enter judgment notwithstanding the verdict, which request was refused.

The narrow question presented on this appeal is whether the trial judge erred in refusing to hold, as a matter of law, that the decedent's negligence was a proximate cause of her death. The answer to this inquiry depends on the answers to two others: (1) Under Ohio law, is proximate cause always a question for the jury? (2) If the answer to this is negative, was Mrs. Corrigan's negligence, as a matter of law, a proximate cause of her death?

Plaintiff relies heavily on *White v. Ohio Power Co.*, 171 Ohio St. 148 (1960), to support his contention that proximate cause is always a jury question. This contention is based on the language of Syllabus 1 of *White*:

> "Where in an action arising from a motor vehicle collision there is evidence of negligence on the part of the defendant and of contributory negligence on the part of the plaintiff, which contributory negligence may have continued to the moment of impact, a jury question exists as to whether such negligence of the plaintiff proximately contributed to the collision."

Since no qualification was placed on this apparently absolute statement, plaintiff argues that a jury question is always presented on the issue of proximate cause.

We do not so construe *White*. There is no language in the body of the opinion which convinces us that the Ohio Supreme Court intended to change the common law rule and overrule earlier Ohio cases which hold that proximate cause may in some circumstances become a question

of law. See *Ziebro v. City of Cleveland,* 157 Ohio St. 489 (1952); *Lawrence v. Toledo Terminal R.R.,* 154 Ohio St. 335 (1950); *Patton v. Pennsylvania R.R.,* 136 Ohio St. 159 (1939).

Regardless of what the *White* syllabus means, however, later Ohio cases hold that the question of proximate cause may under some circumstances become a question of law. In *Bird v. Hart,* 2 Ohio St.2d 9, 11 (1965), it was said:

> "In the instant cases, defendant was negligent as a matter of law. Although the question of proximate cause is ordinarily one for the jury (see *White v. Ohio Power Co.,* 171 Ohio St. 148; *Clinger v. Duncan,* 166 Ohio St. 216), reasonable minds could only conclude that in the instant cases defendant's negligence was the proximate cause of the collision. The trial court should, therefore, have directed verdicts in favor of plaintiffs on the question of liability * * *."

In *Kehrer v. McKittrick,* 176 Ohio St. 192, 195 (1964), it was said: "The question of proximate cause is ordinarily one of fact, but, where there is no conflict in the evidence, such question becomes one of law." The case of *North v. Pennsylvania R.R.,* 9 Ohio St.2d 169 (1967), is to the same effect. We regard these cases as decisive.

So, the question is whether decedent's negligence was such that reasonable minds could only conclude that it was a proximate cause of her death. *Bird v. Hart, supra.* We are of the opinion the proper answer is "Yes."

Proximate cause is a troublesome phrase. It has a particular meaning in the law but is difficult to define. It has been defined as: "That which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of

any unusual circumstance; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated." 65 C.J.S. § 103, *Negligence,* pp. 1130-1131. The Ohio Supreme Court, in reference to a plaintiff charged with contributory negligence, defined the phrase in these words: "[I]f by the exercise of due care he could have avoided injury and death, his failure to exercise such care was the proximate cause of his death." *Patton v. Pennsylvania R.R., supra,* at 167. In the later case of *Clinger v. Duncan,* 166 Ohio St. 216, 222 (1957), it was said:

> "[I]t is generally true that, where an original act is wrongful or negligent and in a natural and continuous sequence produces a result which would not have taken place without the act, proximate cause is established, and the fact that some other act unites with the original act to cause injury does not relieve the original offender from liability."

The question then comes down to this: If plaintiff's decedent had not remained in the car on the highway, would she have been injured? There can be only one answer. The conclusion is inescapable that, if Mrs. Corrigan had somehow been able to get her car off the highway, there would have been no accident. Likewise, even though the car was left on the highway, if she had been out of the car and off the highway, she would not have been injured. There was no real issue as to proximate cause. The decisive issue was whether the decedent was negligent in remaining in her stalled car on this heavily travelled expressway. The jury having found on sufficient evidence that she was negligent, proximate cause followed as a matter of law. Accordingly, the District Court should have entered judgment for the defendant notwithstanding the verdict.

Reversed and remanded.

CELEBREZZE, Circuit Judge, Dissenting: I believe that the issue of proximate cause was properly submitted to the jury and that the verdict and judgment for the Plaintiff should be affirmed.

My conclusion, however, is not based upon the Plaintiff-Appellee's interpretation of *White v. Ohio Power Co.*, 171 Ohio St. 148 (1960). As this Court indicated in *Lones v. Detroit, Toledo and Ironton Railroad Company*, ____ F.2d ____, ____ Notes 2 and 3 (6th Cir. 1968), it is not so clear that Ohio law controls a federal court's determination of the sufficiency of the evidence on any particular factual question to go to the jury. In *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525 (1958), the question of whether a defendant was a "statutory employer" under South Carolina's Workmen's Compensation Act was admittedly a factual determination. South Carolina law required the judge to make that determination, rather than the jury. Rejecting the contention that this allocation of functions was binding on federal courts in diversity actions brought in South Carolina, the United States Supreme Court said:

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. * * * The policy of uniform enforcement of state-created rights and obligations * * * cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury." 356 U.S. at 537-38 (citations and footnotes omitted).

If state law cannot require a federal court invariably to take a certain factual question from the jury, I do not see how state law can require a federal court invariably to permit a certain factual question, regardless of the evidence presented, to go to the jury. *Cf. Herron v. Southern Pacific Company,* 283 U.S. 91 (1931). Therefore, I do not think the rule of *White v. Ohio Power Co.,* 171 Ohio St. 148 (1960), would compel a federal district court to submit the issue of proximate cause to the jury even if the rule was given the interpretation urged by the Plaintiff-Appellee.

Assuming the majority's interpretation of *White* and later Ohio cases to be correct, however, I do not think we need to decide whether those cases bind federal district courts in Ohio in determining when the issue of proximate cause should be taken from the jury in a diversity case. Since it appears that the Ohio standard and the federal standard are the same, as this Court noted in *Lones v. Detroit, Toledo and Ironton Railroad Company,* ____ F.2d, ____, ____ (6th Cir. 1968), it would be inappropriate to decide the question of which standard applies when, as here, the issue has been neither briefed nor argued. *Cf., Dick v. New York Life Insurance Co.,* 359 U.S. 437, 444-45 (1959).

On the facts of the instant case, application of either standard should result in a determination that the jury could have reasonably found that any negligence of the decedent was not the proximate cause of her death. The jury stated that the decedent was negligent in failing "to protect her own life by not getting herself off the highway." The finding of the jury could have at least two bases in evidence. The jury could have concluded that the decedent was negligent in not going with Mr. Prayner

and thus "getting herself off the highway." [1] Or the jury could have concluded that the decedent should have left her car and removed herself to the side of the highway to await assistance.[2]

We can only speculate as to the basis of the jury's answer to the interrogatory. Given the second interpretation, perhaps the majority would be correct on the issue of proximate cause. But given the first interpretation, it seems clear that the jury could have concluded that the negligence of decedent in failing to go with Mr. Prayner had ceased and, therefore, was not a proximate cause of her death.

This result would follow from the Ohio cases cited by the majority and would even more clearly follow if the federal standard was applied. The basis of that standard is the strong federal policy for jury determination of disputed factual questions expressed in the Seventh Amend-

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[1] After stating its opinion on some of the evidence and outlining the contentions on certain other points, the District Court charged the jury:

> "I make reference to these two opinions because there was testimony that the decedent was invited to leave the automobile and go with Praynor [sic], and that she had requested Praynor to use his automobile to push her automobile off of the roadway, which Praynor refused to do. And should you believe that these events did occur as I have related, I instruct you that Shirlee Ann Corrigan was not negligent in declining to leave her automobile to go with Praynor, but instead chose to remain with the automobile."

We do not know whether the jury accepted the opinion of the District Court or found that the events occurred as related by the Court. Therefore, this charge would not have precluded the jury from finding the decedent negligent in failing to go with Mr. Prayner.

[2] Such a finding by the jury would have to be made in the face of the following facts: the decedent was alone in her car, returning home from work after midnight; the month of January and rain had been intermittently falling; and the car was stalled on an expressway about a quarter of a mile from the nearest exit.

ment: "* * * no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law." Applying that expressed policy, *Lavender v. Kurn*, 327 U.S. 645 (1946),[3] defined the proper function of a federal court in reviewing a jury verdict in a civil case:

> "* * * where * * * there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, * * *." 327 U.S. at 653.

Also, Rule 49(b), Federal Rules of Civil Procedure, provides: "when the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58." Since there is an evidentiary basis in this case that makes the jury's answer to the interrogatory harmonious with its verdict, the judgment should be affirmed.

The jury had all the evidence before it; it had the benefit of the persuasive arguments of counsel; and it had a proper instruction on the law. The trial judge, who also heard all of the evidence, thought that the evidence supported the jury's verdict and that the answer to the interrogatory was consistent with the verdict. In reversing the jury verdict and the judgment of the trial court on the basis of the cold record before us, we should be careful that we do not subvert the strong policy favoring jury trials expressed in the Seventh Amendment.

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[3] *Lavender v. Kurn* was an F.E.L.A. case, but it seems clear that the standard stated was applicable to any civil case. See, *Planters Manufacturing Co. v. Protection Mutual Ins. Co.*, 380 F.2d 869 (5th Cir. 1967).

## JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(September 30, 1968.)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded.

It is further ordered that the Defendant-Appellant recover from the Plaintiff-Appellee the costs of this appeal, as itemized below, and that execution therefor issue out of said District Court.

## ORDER DENYING REHEARING.

(Filed November 26, 1968.)

Before: O'Sullivan, Celebrezze, and Combs, Circuit Judges.

The petition for rehearing suggesting rehearing en banc having been transmitted to all members of the Court in regular active service, pursuant to Rule 35(b), Federal Rules of Appellate Procedure, and no judge having requested a rehearing en banc; and the petition for rehearing having been considered by the panel that rendered the decision,

IT IS ORDERED that the petition for rehearing is denied.

Judge Celebrezze dissents.

Entered by order of the Court:

CARL W. REUSS,
*Clerk.*